Supreme Court, U. S.
FILED
MAY 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1202

INTERNATIONAL-STANLEY CORPORATION,
a Nebraska Corporation,

Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
GEORGE E. MAHIN as Director of Revenue
of the State of Illinois, and
ALAN J. DIXON as Treasurer of the State of Illinois,

Appellees.

On Appeal From The Appellate Court
Of Illinois, First District

MOTION TO DISMISS OR AFFIRM

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),

Attorney for Appellees.

PATRICIA ROSEN,
Assistant Attorney General,
160 North LaSalle Street, Suite 800,
Chicago, Illinois 60601 (793-5635),

Of Counsel.

Printed by Authority of the State of Illinois—5-13-77—55

TABLE OF CONTENTS

PAGE

MOTION TO DISMISS 1

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES INVOLVED 2

ARGUMENT 4

I.

The Imposition Of Illinois Retailers' Occupation Tax On The Sales Of Grain Doors Involved In This Case Does Not Burden Interstate Commerce 4

II.

The Illinois Retailers' Occupation Tax Imposed On Plaintiff Was Properly Apportioned 8

CONCLUSION 9

APPENDICES:

A—Opinion of the Illinois Appellate Court, First District 1a

B—Illinois Retailers' Occupation Tax Act, 1973, ch. 120, §440 ..... 15a

TABLE OF AUTHORITIES

Federal Cases:

Bazley v. Commissioner, 331 U.S. 737 (1947) 6

Complete Auto Transit, Inc. v. Brady, 45 L.W. 4259 (1977) 8

Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537, 21 L.Ed.2d 759 (1969) 6

Eastern Air Transport, Inc. v. South Carolina Tax Comm., 285 U.S. 147, 76 L.Ed. 673 (1932) 7

General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430 (1964) 7

Goodstein v. Commissioner, 267 F.2d 127 (1st Cir. 1959) 6

Higgins v. Smith, 308 U.S. 473 (1940) 6

International Harvester Co. v. Dept. of Treasury of Indiana, 322 U.S. 340, 88 L.Ed. 1313 (1944) 7

Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951) 8

Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975) 7

State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co., 372 U.S. 605, 10 L.Ed.2d 8 (1963) 7

United Air Lines, Inc. v. Mahin, 410 U.S. 623, 35 L.Ed. 2d 545 (1973) 6

Wisconsin v. J.C. Penney Co., 311 U.S. 435, 85 L.Ed. 267 (1940) 7

State Cases:

Abt v. Department of Revenue, 34 Ill.2d 324, 215 N.E. 2d 243 (1966) 5

American Air Lines, Inc. v. Department of Revenue, 58 Ill.2d 251, 319 N.E.2d 28 (1974) 7

Federal Bryant Machinery Co. v. Department of Revenue, 41 Ill.2d 64, 241 N.E.2d 857 (1968) 5

Marshall & Huschart Machinery Co. v. Department of Revenue, 18 Ill.2d 496, 165 N.E.2d 305, cert. den. 363 U.S. 820 (1960) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1202

INTERNATIONAL-STANLEY CORPORATION,
a Nebraska Corporation,

Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,
GEORGE E. MAHIN as Director of Revenue
of the State of Illinois, and
ALAN J. DIXON as Treasurer of the State of Illinois,

Appellees.

On Appeal From The Appellate Court
Of Illinois, First District

MOTION TO DISMISS AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents, Department of Revenue of the State of Illinois, *et al.*, respectfully pray that this Court dismiss the appeal sought from the decision of the Illinois Appellate Court entered July 6, 1976. Respondents further pray that a Writ of Certiorari to the Appellate Court of Illinois be denied.

OPINION BELOW

The opinion of the Illinois Appellate Court, First District is reported at 40 Ill.App.3d 397, 352 N.E.2d 272 (1976). The opinion is included herein as Appendix A.

JURISDICTION

Jurisdiction is predicated upon 28 U.S.C. §§ 1257(2) and 2101(c).

QUESTIONS PRESENTED

1. Whether a state may validly tax a local sale of goods to be used or consumed in interstate commerce.

2. Whether the Illinois Retailers' Occupation Tax Act imposes an unapportioned gross receipts tax.

STATUTE INVOLVED

Pertinent provisions of the Illinois Retailers' Occupation Tax Act, Ill.Rev.Stat., 1973, ch. 120, are reprinted herein as Appendix B.

STATEMENT OF THE CASE

Plaintiff is a Nebraska corporation which is owned equally by International Paper Company and Stanley Works, both of which are licensed to do business in the State of Illinois. The grain doors are manufactured by International Paper at its plant in Illinois and the accessories and tools are manufactured by Stanley Works at its Illinois plant.

Plaintiff employs three salesmen and three engineers who work almost exclusively in the State of Illinois. The salesmen generate and solicit orders. The engineers familiarize users of the grain doors with installation and investigate complaints. All orders are accepted at plaintiff's out-of-state offices, although the parties stipulated that no order has been rejected within memory and it is difficult to conceive of a situation in which an order would be rejected.

The Illinois Appellate Court, First District, held that, despite plaintiff's corporate structure, its sales of grain doors were local sales and, where the purchasing railroads took delivery inside the state of Illinois, the sales were subject to retailers' occupation tax. Plaintiff has appealed from this determination.

ARGUMENT

I.

THE IMPOSITION OF ILLINOIS RETAILERS' OCCUPATION TAX ON THE SALES OF GRAIN DOORS INVOLVED IN THIS CASE DOES NOT BURDEN INTERSTATE COMMERCE.

Contrary to the arguments advanced by plaintiff in the instant case, the holding of the Illinois Appellate Court was not "that a tax may be assessed because the grain doors were 'delivered' within Illinois . . .", but rather the Court held that the plaintiff was subject to Illinois retailers' occupation tax because it was engaged in the business of selling tangible personal property at retail within the State of Illinois. Although plaintiff had organized its corporate structure to ensure that the technical acceptance of all orders occurred out-of-state, the Illinois Appellate Court held that taxability was dependent "upon the actuality of the situation", rather than the "externalities of corporate activity". Reviewing the facts of this case the Court held,

> Likewise, in the instant action, two corporations which are licensed to do business in Illinois and which manufacture products within the State, have formed a subsidiary outside of Illinois which markets their products. If the actual corporate owners of plaintiff were each to sell its products directly to the railroads they would be liable under ROTA. By acting in concert through the use of plaintiff corporation, the actual owners thereof have attempted to structure their sales and corporate activities so that ROTA is not applicable.
>
> The stipulated facts above cited demonstrate that the greater portion of activities in connection with retail sales to railroads by plaintiff took place within Illinois. Orders from customers within the State were actively solicited by plaintiff's salesmen

> domiciled within Illinois. All activities in connection with the actual filling of these orders such as manufacture, shipment and in many cases delivery took place within Illinois. Plaintiff maintained an inventory of tools and accessories in Illinois. The complete domination and management of plaintiff by its corporate owners is also apparent from the record. With one exception, all officers of plaintiff are officers or employees of its corporate owners. The directors of plaintiff are appointed by these same owners. Both of these corporate owners are licensed to do business in Illinois and have plants located within the State.
>
> It is correct, as plaintiff points out in detail, that many of its activities were carried out in locations other than the State of Illinois, including maintenance of a business headquarters, billing, collection and the keeping of records; but, the proper criterion to be applied here is not so much the quantum of activities outside of the State as it is the nature, character and significance of activities of plaintiff within the State of Illinois directly related to the business of retail selling. It follows necessarily that plaintiff is a retailer in Illinois, subject to the provisions of ROTA.

This holding is predicated upon the well-settled rule that the State has the right to stop behind a transaction which has been contrived by a taxpayer for purposes of tax evasion. *Marshall & Huschart Machinery Co. v. Department of Revenue*, 18 Ill.2d 496, 165 N.E.2d 305, *cert. den.* 363 U.S. 820 (1960); *Federal Bryant Machinery Co. v. Department of Revenue*, 41 Ill.2d 64, 241 N.E.2d 957 (1968); *Abt v. Department of Revenue*, 34 Ill.2d 324, 215 N.E.2d 243 (1966).

It should be noted that while transactions are not invalid merely because they are undertaken for the purpose of minimizing or avoiding taxes, unless there is a

valid business purpose other than tax avoidance, a transaction will not be recognized as valid and will be found to be taxable. When the object of the transaction is to act as a mere device for a preconceived result of tax avoidance, such a transaction will be recognized as a sham. *Gregory v. Helvering*, 283 U.S. 465 (1935); *Higgins v. Smith*, 308 U.S. 473 (1940); *Bazley v. Commissioner*, 331 U.S. 737 (1947); *Goodstein v. Commissioner*, 267 F.2d 127 (1st Cir. 1959). In the instant case, the Court found that the corporate structure of plaintiff was organized for the purpose of tax avoidance and, therefore, it held that plaintiff was engaged in the business of selling at retail within the State of Illinois and was subject to Illinois retailers' occupation tax.

It cannot be disputed that interstate commerce is not absolutely immune from state taxation. Interstate commerce can be required to pay a nondiscriminatory share of the State tax burden. *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 35 L.Ed.2d 545 (1973). In determining whether a state tax imposes an impermissible burden on interstate commerce, the issue is whether the local activity which is made the subject of the tax is such an integral part of the interstate process—the flow of commerce—that it cannot really be separated from it. *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537, 540, 21 L.Ed.2d 759 (1969). A tax on local sales has never been held to be such an "integral" part of commerce.

Since the Appellate Court held that plaintiff was engaged in the business of selling at retail in Illinois, and since the purchasing railroads took delivery of the goods (grain doors) inside the State, the sale was not made in interstate commerce. The Illinois Supreme Court has held:

> It is clear that when a purchaser in a sale in Illinois takes delivery of the goods in Illinois the sale is not in interstate commerce and is taxable under State law, though the purchaser immediately takes the goods out of Illinois (citations omitted). *American Airlines, Inc. v. Department of Revenue*, 58 Ill.2d 251, 319 N.E.2d 28 (1974).

This Court has frequently held that the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a nondiscriminatory tax imposed by the State. *Eastern Air Transport, Inc. v. South Carolina Tax Comm.*, 285 U.S. 147, 76 L.Ed. 673, 675 (1932); *State Tax Commission of Utah v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605, 10 L.Ed.2d 8 (1963); *International Harvester Co. v. Dept. of Treasury of Indiana*, 322 U.S. 340, 88 L.Ed. 1313 (1944). Since the sales in question in the instant case were not made in interstate commerce, they were properly taxable by the State of Illinois, despite the fact that the goods were immediately taken from the State and used in interstate commerce. Such a tax is not a direct tax on interstate commerce.

Furthermore, this Court has frequently upheld taxes which were direct taxes upon interstate commerce when the tax was applied to an activity which had a substantial nexus with the taxing state, was fairly apportioned, did not discriminate against interstate commerce and was fairly related to the services provided by the taxing state. *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L.Ed.2d 430 (1964); *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560 (1975); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444, 85 L.Ed. 267 (1940).

Historically, there was a blanket prohibition against any state taxation imposed directly on an interstate transaction. Therefore, a direct tax on interstate sales, even if fairly apportioned and nondiscriminatory, was held to be unconstitutional *per se. Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). However, this rule was specifically overturned in the recent decision in *Complete Auto Transit, Inc. v. Brady*, 45 L.W. 4259, 4263 (1977). Therefore, it is clear that a state may validly impose a tax on the privilege of carrying on an interstate business, so long as the tax is fairly apportioned and nondiscriminatory in nature. Consequently, a much stronger case for local taxation is made where, as here, the sales have been found to be local sales, even though technical acceptance of the orders was made by the out-of-state corporation. Under such circumstances, the local tax is valid unless it directly burdens interstate commerce. The taxpayer in the instant case has not contended that the Illinois tax discriminates against individuals engaged in interstate commerce. Therefore, the tax can validly be imposed.

II.

THE ILLINOIS RETAILERS' OCCUPATION TAX IMPOSED UPON PLAINTIFF WAS PROPERLY APPORTIONED.

Taxpayer's final contention, that this tax is an unapportioned gross receipts tax upon interstate commerce, is likewise without merit. The Illinois Retailers' Occupation Tax Act (Ill.Rev.Stat., 1973, ch. 120, § 440, *et seq.*) imposes a tax on the privilege of selling tangible personal property at retail within the State of Illinois. While it is true that the ROTA is measured by "gross receipts" from sales, these sales—in order to be taxable under the Act—must occur within the taxing state.

The term "duly apportioned" was defined by this Court in *Complete Auto Transit* as "* * * [a tax which] does not undertake to tax any interstate activities carried on outside the state's borders . . ." (*Id.* 45 L.W. at 4261). The tax imposed by the State of Illinois meets this requirement. The State is not attempting to impose a tax upon the entire gross receipts of the corporation, nor is it attempting to impose a tax on any sale which was not made in Illinois. A tax is only imposed on the gross receipts generated from sales made within Illinois, where the purchasing railroads also took delivery of the goods inside of the State. Such a tax is duly apportioned and does not offend the commerce clause.

CONCLUSION

WHEREFORE for the foregoing reasons, the defendants respectfully pray that this Honorable Court dismiss the appeal or deny a Writ of Certiorari, or, in the alternative, that the decision of the Illinois Appellate Court be summarily affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North LaSalle Street, Suite 900,
Chicago, Illinois 60601 (793-3500),

Attorney for Appellees.

PATRICIA ROSEN,
Assistant Attorney General,
160 North LaSalle Street, Suite 800,
Chicago, Illinois 60601 (793-5635),

Of Counsel.

May 13, 1977

APPENDIX A

61008

INTERNATIONAL-STANLEY CORP.,
Plaintiff-Appellee,
Cross-Appellant,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, GEORGE E. MAHIN, as Director of Revenue of the State of Illinois, et al.,
Defendants-Appellants,
Cross-Appellees.

Appeal from the Circuit Court of Cook County.

Honorable Raymond S. Sarnow, Judge Presiding.

MR. PRESIDING JUSTICE GOLDBERG delivered the opinion of the court:

International-Stanley Corporation (plaintiff) paid certain assessments to the Illinois Department of Revenue (defendant), under protest. (Ill. Rev. Stat. 1975, ch. 127, par. 172.) The assessments related to the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1975, ch. 120, par. 440 *et seq.*) and the Use Tax Act (Ill. Rev. Stat. 1975, ch. 120, par. 439.1 *et seq.*) On plaintiff's complaint seeking declaratory and injunctional relief, the circuit court held that those transactions in which the tangible personal property allegedly sold by plaintiff was attached to and became part of rolling stock moving in interstate commerce were not subject to either tax; but, conversely, that those transactions in which tangible personal property was attached to and made a part of rolling stock not moving in interstate commerce were subject to both types of taxes. Defendant appeals and plaintiff cross-appeals.

The pertinent facts appear from a stipulation entered into by the parties before trial and from testimony at trial. Plain-

tiff is a corporation engaged in the sale of products to railroads for use in connection with shipment of grain and other loose, unpackaged commodities in bulk. The plaintiff's products are grain doors, hopper car covers and the tools and accessories used in connection therewith. Grain doors are corrugated paper panels which are nailed across the inside of railroad boxcar doorways or used to line weakened inside walls of railroad freight cars. Hopper car covers are used to cover open-top railroad cars. In addition, plaintiff sells tools and accessories used in connection with the installation of these grain doors and hopper car covers.

The plaintiff's railroad customers furnish the grain doors, hopper car covers and accessories to bulk shippers. This protects open-car shipments from the elements and prevents loose products, such as grain, from spilling out of freight cars; thus enabling the common carrier railroads to "furnish safe and adequate car service" in compliance with federal law. 49 U. S. C. § 1(11)(1959).

Regarding shipment and delivery of the grain doors, the parties stipulated that after the doors are delivered to the railroad they are stored at various points along the railroad line pending redelivery to the shippers. These storage points are generally at or near the point where shipment of the bulk product commences. The grain doors are then delivered to shippers along with empty railroad freight cars.

The tariffs provide that the grain doors are to be installed by the shipper at its own expense. But, when the shipper so elects, the railroad will install the grain doors at the point of loading for a charge of $2.54 per car. It is also stipulated that the installation of the grain doors and accessories is "part of the process of loading the freight car." The doors and accessories are used only for one single continuous shipment and are not reused. Rates charged by the railroads for shipment are subject to prior approval by the Interstate Commerce Commission. Generally the rates, as approved, include a charge for the grain doors and accessories furnished to shippers by the railroads. In those few instances where a charge is not included in the rate, the railroad charges the shipper an additional fee for the grain doors and accessories. There was testimony at trial that this extra fee situation is limited to those instances where freight is carried "cross town" within the same terminal.

Plaintiff is a Nebraska corporation owned equally by International Paper Company, a New York corporation, and The Stanley Works, a Connecticut corporation, both of which are licensed to do business in Illinois. The grain doors are manufactured by International Paper at its plant in Illinois. The hopper car covers are manufactured at its plant in Arkansas. The accessories and tools are manufactured by Stanley Works at its Illinois plant. Upon completion of tools and accessories they are shipped to the International Paper plant in Illinois for storage pending further shipment. While thus in storage in Illinois, these items are included in plaintiff's inventory.

Plaintiff employs three salesmen and three engineers who work almost exclusively in Illinois. The salesmen generate and solicit orders. The engineers familiarize users of the grain doors with installation and investigate complaints about these items. The salesmen have no authority to accept orders from plaintiff's customer railroads. Instead, all customers prepare purchase orders which are sent directly to plaintiff's Nebraska office. Although plaintiff is under no duty to accept an order from a customer railroad, it has not rejected any such order within memory. The parties also stipulated that it is difficult to conceive of a situation in which an order would be rejected. Similarly, payment of plaintiff's invoices are made to plaintiff's Nebraska office where collection of accounts originates.

There are five distinct fact patterns regarding shipment and delivery of the grain doors and hopper car covers which are pertinent to this appeal:

1). The customer railroad takes delivery of the grain doors outside of Illinois and functional use of the doors commences outside of Illinois.[1]

2). The railroad takes delivery of the grain doors in Illinois where functional use begins.

3). The railroad takes delivery of the grain doors in Illinois but transports them out of the State where functional use will then begin.

4). The railroad takes delivery of the doors outside of Illinois but brings them into Illinois where functional use begins.

5). Hopper car covers, manufactured by International Paper in Arkansas, are delivered to railroads in Illinois to fill orders received by plaintiff.

The parties have agreed that the transactions in category number 1 are not subject to Illinois Retailers' Occupation Tax or Use Tax. As will later be detailed, categories 2, 3 and 4 form the issues concerning assessment of Retailers' Occupation Tax. Illinois Use Tax comes directly into question primarily with regard to the hopper car covers in category 5.

In September 1964, the Illinois Department of Revenue audited plaintiff's books and records. The Department subsequently notified plaintiff that it was liable for $208,335.96 under the Illinois Retailers' Occupation and Use Tax Acts, for the period from January 1, 1961 through January 31, 1964. Plaintiff paid this amount under protest. Various additional assessments were made and are to be included in the disposition made thereof by this opinion.

On November 13, 1964, plaintiff filed a complaint in the circuit court seeking an adjudication that its sales of grain doors were not subject to either Retailers' Occupation or Use Taxes. Plaintiff prayed injunctive relief restraining defendant from collecting such taxes from plaintiff. Plaintiff further prayed a

1. Functional use of the grain doors is deemed to begin when they are affixed to the freight cars prior to loading of the cars.

refund of all amounts paid. On November 16, 1964, the trial court enjoined defendant from disbursement and use of these payments and of any future amounts paid by plaintiff under protest in connection with its sales of grain doors and accessories.

In this court, defendant contends that plaintiff's sales of grain doors were subject to taxation under the Illinois Retailers' Occupation Tax Act; the application of that tax does not burden interstate commerce; the grain doors sold to the railroads by plaintiff were not "resold" by the railroads within the meaning of the Retailers' Occupation Tax Act; plaintiff's sales of grain doors and hopper car covers were subject to taxation under the Illinois Use Tax Act and plaintiff's sales were not exempt from taxation under the statutory exemption for rolling stock moving in interstate commerce.

Plaintiff urges that the trial court correctly held that the commerce clause of the United States Constitution prohibits taxation of those grain doors which become part of rolling stock moving in interstate commerce; the trial court erred in failing to hold that plaintiff was not a retailer at all; even assuming arguendo that plaintiff was a retailer, the trial court erred in failing to hold that plaintiff is not liable for Retailers' Occupation Taxes since it is not engaged in a retail occupation within Illinois; the trial court erred in failing to hold that the Interstate Commerce Clause forbids imposition of Retailers' Occupation Tax because plaintiff's receipts from interstate commerce would be taxed without apportionment between the portion of plaintiff's occupation conducted within Illinois and the portion conducted outside of the State; and the trial court erred in failing to hold that because of the rolling stock exemption in the Illinois Use Tax Act, the railroads incurred no use tax liability and plaintiff had no liability to collect use taxes from the railroads.

Both the Retailers' Occupation Tax Act (herein "ROTA", Ill. Rev. Stat. 1975, ch. 120, par. 440 *et seq.*) and the Use Tax Act, (herein "UTA", Ill. Rev. Stat., 1975, ch. 120, par. 439.1 *et seq.*) impose taxation only in the event of a retail sale. The

ROTA defines a sale at retail as a sale "for the purpose of use or consumption, and not for the purpose of resale * * *, for a valuable consideration." (Ill. Rev. Stat. 1975, ch. 120, par. 440.) The UTA definition of a retail sale is a sale "for the purpose of use, and not for the purpose of resale * * *, for a valuable consideration." (Ill. Rev. Stat. 1975, ch. 120, par. 439.2.) Plaintiff contends in its cross-appeal that it sells grain doors and related items to railroads for resale and not for use or consumption so that neither tax is applicable. This raises the initial issue as to whether plaintiff sells grain doors and accessories and hopper car covers at retail within the meaning of the statutes with particular reference to categories 2, 3, 4 and 5 above.

Plaintiff has cited a mass of authority regarding this issue. A discussion of all or even most of the cases cited would be impossible for reasons of space limitation. Our study has led us to conclude that the opinion of the Supreme Court of Illinois in *American Airlines* v. *Dept. of Revenue* (1974), 58 Ill. 2d 251, 319 N. E. 2d 28, is dispositive of plaintiff's contention in this regard. In *American Airlines* plaintiff purchased food from a supplier to be served to passengers in flight. The passengers were not charged additional sums for these meals beyond the cost of their tickets. The court stated that "a sale is one for use and consumption and not for resale, even though the purchaser transfers the commodity purchased, provided he does not transfer it for a direct and specific consideration." (58 Ill. 2d 251, 257, quoting from *Fefferman* v. *Marohn* (1951), 408 Ill. 542, 547, 97 N. E. 2d 785.) The Supreme Court thus held that, although passengers paid a fare which included a charge for meals, the airline was essentially selling transportation and there was no sale of meals by them within the meaning of the ROTA.

Similarly, in the instant action, the grain door covers and related items are furnished to the shippers by the railroads without additional charge but are included in the tariffs charged for railroad transportation. The railroads which purchase grain doors from plaintiff are essentially selling shipping services re-

garding which acquisition and disposition of the grain doors is merely incidental.

Plaintiff cites and depends upon Rule 50, par. 2, promulgated by the defendant. This rule provides, in effect, that where tangible personal property is sold to purchasers who transfer it to others, along with services for which a charge is made, this property is being sold or transferred for purposes of resale and thus the sellers or transferors are not liable under ROTA. Plaintiff reasons from this rule that it is merely transferring the grain doors to the railroads who in turn transfer them to the shippers, together with transportation service for which a charge is made, so that plaintiff should not be liable under ROTA. In our opinion, this Rule 50 is not applicable in the case before us. Rule 50, according to its title, is applicable to "vendors of tangible personal property employed for premiums, advertising, prizes, etc." We reject plaintiff's contention that it employs the grain doors for premiums, advertising, prizes or for any allied or similar use within the purview of Rule 50. No such situation is presented by the case before us. Our rejection is based in part upon *Boye Needle Co.* v. *Dept. of Revenue* (1970), 45 Ill. 2d 484, 259 N. E. 2d 278, where the court considered a situation regarding distribution of display racks by a distributor as premiums or rewards to various retailers who had purchased large quantities of merchandise. The court held that under Rule 50 the transfer of the premiums to the distributor from purveyors thereof was not subject to ROTA.

Plaintiff urges in this regard that the user of an item of tangible personal property is the person who utilizes the item in furtherance of its own business welfare and that in *American Airlines*, the airline, and not the passenger who ultimately consumed the meal, was the user of the food for purposes of ROTA. As the parties stipulated, railroads are required by federal law to furnish grain doors. Installation of the doors at the expense of the shipper does not alter the fact that the railroads use the doors in direct furtherance of their business activities quite

comparable to the manner in which airlines use meals served in flight.

We next consider whether plaintiff was engaged in a retail occupation in Illinois so that it is subject to taxation under the ROTA. There is an accepted legal distinction between performance of activities which constitute a retail occupation within Illinois and mere occurrence of a sale at retail within the State. (*Automatic Voting Mach. Corp.* v. *Daley* (1951), 409 Ill. 438, 447, 100 N. E. 2d 591.) Plaintiff correctly contends that mere solicitation of sales by agents located in Illinois is not sufficient to bring a seller within the ROTA. *Ex-Cell-O Corp.* v. *McKibbin* (1943), 383 Ill. 316, 50 N. E. 2d 505.

In defining solicitation, the courts have carefully examined the authority of the soliciting agent. (*Ex-Cell-O Corp.*, 383 Ill. 316, 322.) In *Ex-Cell-O Corp.*, plaintiff's sales agents did not have authority to accept or reject orders and "acceptance or rejection was not in any respect a perfunctory matter but involved an exercise of the engineering skill of plaintiff's employees and whether it was equipped to deliver such specified machines in the form and within the time stated in the order." (383 Ill. 316, 320.) Quite to the contrary, in the case before us, the parties have stipulated that, plaintiff's home office has the authority to reject orders solicited by its agents in Illinois, "but has not done so within memory, and it is difficult to conceive of a situation where it would do so." This stipulation, combined with the fact that plaintiff employs three engineers in Illinois to familiarize users of the grain doors with methods of installation and to investigate customer complaints, leads us to conclude that plaintiff's activities in Illinois are greater than the mere solicitation contemplated by the Supreme Court in *Ex-Cell-O* and similar cases.

In determining whether plaintiff is engaged in a retail occupation in Illinois, many factors must be considered. The Supreme Court recognized this in *Ex-Cell-O* where it stated (383 Ill. 316, 321, 322):

> "An occupation, the business of which is to sell tangible personal property at retail, is the composite of many activities extending from the preparation for, and the obtaining of, orders for goods to the final consummation of the sale by the passing of title and payment of the purchase price. It is obvious that such activities are as varied as the methods which men select to carry on retail business and it is therefore not possible to prescribe by definition which of the many activities must take place in Illinois to constitute it an occupation conducted in this State. Except for a general classification that might be made of the many retail occupations, it is necessary to determine each case according to the facts which reveal the method by which the business is conducted."

In addition to the work of plaintiff's salesmen and engineers within Illinois, the grain doors are manufactured in, shipped from, and, in many instances, delivered within this State.

The Illinois Supreme Court has looked beyond the form of an allegedly interstate transaction to find that it actually constituted an intrastate sale, taxable under the ROTA. In *Marshall & Huschart Co.* v. *Rev. Dept.* (1960), 18 Ill. 2d 496, 165 N. E. 2d 305, *cert. denied* 363 U. S. 820, and *Federal-Bryant Machinery* v. *Rev. Dept.* (1968), 41 Ill. 2d 64, 241 N. E. 2d 857, the plaintiff corporations structured their sales so that they were ostensibly interstate in nature, thereby avoiding payment under ROTA in Illinois. Depending upon the actuality of the situation rather than the externalities of corporate activity, the Supreme Court held plaintiffs liable for payment of the tax.

Likewise, in the instant action, two corporations which are licensed to do business in Illinois and which manufacture products within the State, have formed a subsidiary outside of Illinois which markets their products. If the actual corporate owners of plaintiff were each to sell its products directly to the railroads they would be liable under ROTA. By acting in concert through the use of plaintiff corporation, the actual owners thereof have attempted to structure their sales and corporate activities so that ROTA is not applicable.

The stipulated facts above cited demonstrate that the greater portion of activities in connection with retail sales to railroads by plaintiff took place within Illinois. Orders from customers within the State were actively solicited by plaintiff's salesmen domiciled within Illinois. All activities in connection with the actual filling of these orders such as manufacture, shipment and in many cases delivery took place within Illinois. Plaintiff maintained an inventory of tools and accessories in Illinois. The complete domination and management of plaintiff by its corporate owners is also apparent from the record. With one exception, all officers of plaintiff are officers or employees of its corporate owners. The directors of plaintiff are appointed by these same owners. Both of these corporate owners are licensed to do business in Illinois and have plants located within the State.

It is correct, as plaintiff points out in detail, that many of its activities were carried out in locations other than the State of Illinois, including maintenance of a business headquarters, billing, collection and the keeping of records; but, the proper criterion to be applied here is not so much the quantum of activities outside of the State as it is the nature, character and significance of activities of plaintiff within the State of Illinois directly related to the business of retail selling. It follows necessarily that plaintiff is a retailer in Illinois, subject to the provisions of ROTA.

Defendant next urges that the imposition of ROTA upon plaintiff's sales of grain doors and accessories does not offend the Commerce Clause of the federal constitution. Plaintiff answers this argument by raising two contentions. First, with regard to categories 2, 3 and 4, plaintiff argues that ROT is an impermissible, unapportioned tax on gross receipts from interstate commerce. Plaintiff's second contention is that taxation of its sales in category 3 is prohibited by the Commerce Clause because these grain doors are used in interstate commerce outside of the State.

The Illinois Supreme Court has held that "when a purchaser in a sale in Illinois takes delivery of the goods in Illinois, the sale is not in interstate commerce and is taxable under State law, though the purchaser immediately takes the goods out of Illinois for use outside of Illinois." (*American Airlines* v. *Dept. of Revenue* (1974), 58 Ill. 2d 251, 259, 319 N. E. 2d 28.) As shown above, plaintiff was engaged in a retail occupation in Illinois at the time in question here, and the deliveries of the grain doors in categories 2 and 3 occurred within the State. The ROTA assessment which plaintiff has challenged does not tax its gross receipts from all sales, but only from those sales arising out of its activities as an Illinois retailer. The fact that plaintiff conducts some of its business activities outside the State does not preclude defendant from taxing these sales of grain doors and accessories in categories 2 and 3 which took place within Illinois. *Norton Co.* v. *Dept. of Revenue* (1950), 405 Ill. 314, 90 N. E. 2d 737, reversed in part, 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377, modified, 409 Ill. 216, 99 N. E. 2d 346.

The requirement that a local incident occur to bring a sale within the taxing power of a state (*Norton Co.* v. *Dept. of Revenue* (1951), 340 U. S. 534) was recognized by the Illinois Supreme Court in *American Airlines*. Therefore, we find that sales in category 4 are not subject to ROTA because they were delivered to the purchasing railroads outside the State of Illinois. We will discuss the application of UTA to these transactions in a later portion of this opinion.

In its argument regarding category 3, wherein grain doors and accessories were delivered to purchasing railroads within Illinois and taken outside of the State before functional use began, plaintiff urges this court to disregard an established line of cases concerning the constitutionality of ROTA as applied to sales of various commodities to railroads for use outside of Illinois. (*Pressed Steel Car Co.* v. *Lyons* (1955), 7 Ill. 2d 95, 129 N. E. 2d 765; *Superior Coal Co.* v. *Dept. of Revenue*

(1954), 4 Ill. 2d 459, 123 N. E. 2d 713 and *Moffat Coal Co.* v. *Daley* (1950), 405 Ill. 14, 89 N. E. 2d 892.) Plaintiff argues that these cases are inapplicable here because the grain doors and accessories are used by the shippers rather than by the railroads. As shown above, the fact that the shippers themselves either install the grain doors or pay the railroad for such installation does not affect our conclusion that the grain doors are used by the railroads to promote their own business welfare by enabling them to provide appropriate cars for shipping as required by federal law.

The fact that the grain doors are sold and delivered to railroads in Illinois for use out of the State does not necessarily make the sales transaction interstate so as to render application of ROTA unconstitutional. (*Moffat Coal Co.*, 405 Ill. 14, 16.) Furthermore, the Supreme Court has rejected the argument that the role of a railroad as a carrier when it carries goods consigned to itself is separate and divorced from its role as a purchaser of such goods. (*Pressed Steel Car Co.*, 7 Ill. 2d 95, 101.) We conclude that imposition of the tax by defendant on sales in category 3 is within constitutional requirements.

We next consider whether Illinois UTA applies to plaintiff's sales of grain doors and accessories in category 4 and to sales of hopper car covers in category 5. We need not reach the question of whether UTA is applicable to transactions in categories 2 and 3 because the ROTA is applicable to those sales and the parties have stipulated that "if plaintiff is held liable for the Illinois retailers' occupation or use tax on account of its 'taxable' sales of grain doors and accessories during the First [Assessment] Period it has already paid the use taxes to which the proposed assessments * * * relate." Therefore, plaintiff would in no event be liable for additional or double payments due to use tax liability for those same sales.

At all times pertinent to this litigation, the UTA included an exception for:

> "the use, in this State, of tangible personal property which is acquired outside the State and which is moved into this State for use as rolling stock moving in interstate commerce; * * *."

(Ill. Rev. Stat. 1965, ch. 120, par. 439.3.) In July, 1965, the legislature defined the term "acquired outside this state" as follows:

> "'Acquired outside this State', whenever used in this Section, in addition to its usual and popular meaning, shall include the delivery, outside Illinois, of tangible personal property that is purchased in this State and delivered from a point in this State to the point of delivery outside this State."

(Ill. Rev. Stat. 1965, ch. 120, par. 439.3.) Defendant correctly concedes that this exception applies to grain doors and accessories in category 4 which were delivered to the purchasing railroads outside of Illinois, even though they might later be brought into the State for use.

Plaintiff further contends that the rolling stock exception to the statute applies to the hopper car covers delivered to railroads in Illinois from Arkansas. To support its argument, plaintiff suggests that the 1967 amendment to the UTA which deleted the requirement that the exempt items be acquired outside of the State, was intended to apply retroactively. We reject plaintiff's argument because Illinois statutes are prospective in their operation and will not be construed to be retroactive unless the statutory language is so clear that it cannot be construed otherwise. (*People* v. *Lindheimer* (1939), 371 Ill. 367, 21 N. E. 2d 318.) Plaintiff's reliance on *Johnson* v. *Marshall Field & Co.* (1972), 8 Ill. App. 3d 937, 291 N. E. 2d 310, affirmed 57 Ill. 2d 272, 312 N. E. 2d 271, in this regard is misplaced. In that case, the court considered an amendment to a taxing statute in construing the legislature's intent in enacting the original statute. However, the statutory amendment specifically stated what the legislature had intended "since the inception of" the statute in question. (See 8 Ill. App. 3d 937, 940.) The UTA contains no similar language. Therefore, we

find that the rolling stock exemption did not apply to the sales in category 5 and that plaintiff was properly assessed for use tax in connection with those sales.

We reach the following results with regard to the various categories of sales set out above. As above shown, transactions in category number 1 are not subject to ROTA or to UTA. Sales in categories 2 and 3 may be taxed under ROTA. Sales in category 4 are exempt from taxes under both ROTA and UTA. Sales in category 5 are taxable only under UTA. These guidelines should enable the trial court to determine the merits of each assessment attempted against plaintiff. The final judgment order entered July 24, 1974, is reversed and the cause is remanded with directions that further proceedings be had and additional orders be entered herein not inconsistent with the views above expressed and the conclusions reached.

REVERSED AND REMANDED WITH DIRECTIONS.

BURKE, *J.*, and O'CONNOR, JR., *J.*, concur.

APPENDIX B

Ill. Rev. Stat., 1973, ch. 120, § 440:

"Sale at retail" means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use for which it was purchased, for a valuable consideration.

* * *

"Sale at retail" shall be construed to include any transfer of the ownership of or title to tangible personal property to a purchaser, for use or consumption by any other person to whom such purchaser may transfer the tangible personal property without a valuable consideration, and to include any transfer, whether made for or without a valuable consideration, for resale in any form as tangible personal property:

* * *

"Selling price" or the "amount of sale" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property, other than as hereinafter provided, and services, but not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold, and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever.